

SOUTH AFRICA / JUDGMENT

Phoenix Salt Industries (Pty)Ltd v Lubavich Foundation of South Africa (2022/1298)

[2023] ZAGPJHC 27 (19 January 2023)

[2023] ZAGPJHC 27

COURT

South Gauteng High Court, Johannesburg

BEFORE

Swanepoel

CASE / FILE NUMBER

2022/1298

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FLYNOTES:

THE SHIFREN STRAITJACKET
CONTRACT –
Non-variation – Shifren rule – Whether pactum de non
petendo struck by the non-variation and
non-waiver clauses in loan
agreement – Variation and waiver discussed – Party
claiming payment having waived
its right to call up the loan.
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Case
number: 2022/1298
Date
of hearing: 15 November 2022
Date
delivered: 19 January 2023

REPORTABLE:

NO
OF
INTEREST TO OTHERS JUDGES: NO
REVISED
In

the matter between: PHOENIX
 SALT INDUSTRIES (PTY) LTD
 Applicant
 and
 THE
 LUBAVICH FOUNDATION
 OF
 SOUTHERN
 AFRICA
 Respondent

JUDGMENT

SWANEPOEL J:

- [1] Applicant seeks an order for payment by respondent of the sum of R 2 886 005.20, interest thereon, and costs. The claim arises from a written loan agreement concluded by the parties on 12 August
1994. A third party to the agreement was Golden Hands Property Holdings (Pty) Ltd (“Golden Hands”).
- [2] The respondent is an organization that aims to advance the interests of the Jewish community in Johannesburg, and to that end it runs a school for Jewish scholars on properties in the Orchards area. During 1994 the respondent was indebted to Nedbank Ltd in the sum of some R 5 million, which loan was secured by mortgage bonds over the Orchards
- properties, and over properties referred to as the “Klipfontein” properties.
- [3] Respondent was experiencing difficulties in servicing the loans, which caused two of its long-standing benefactors, the brothers Abraham and Solomon Krok, to come to respondent’s rescue. They proposed paying off the Nedbank debt, and taking over the Nedbank loan through applicant, a shelf company controlled by them. They proposed that applicant enter into a loan agreement with respondent on more favourable terms than the Nedbank loan, with applicant also taking cession of the mortgage bonds as security for the loan.
- [4] On 12 August 1994 the parties entered into a written contract which embodied the above terms (“the loan agreement”). In the same agreement Golden Hands bound itself as surety and co-principal debtor with respondent for the due and punctual performance of respondent’s obligations arising from the loan agreement.
- [5] On the same day, respondent entered into a separate written agreement with Golden Hands (“the sale agreement”) in terms of which respondent sold 4 immovable properties to Golden Hands at a purchase price of R 5.2 million. The purchase price was, in terms of the written sale agreement at least, payable on transfer. Golden Hands intended to erect a cluster development on the four properties. In terms of the loan agreement Golden Hands ceded its

right to receive the proceeds from the sale of the cluster houses to applicant, in order to reduce respondent's indebtedness. Golden

Hands never paid respondent the purchase price for the properties.

[6] A material term of the loan agreement reads as follows:

"9.1 This agreement, together with the annexure thereto, constitutes the sole record of the agreement between the parties in regard to the subject matter thereof.

9.2 Neither party shall be bound by any representation, express or implied term, warranty, promise or the like not recorded herein or reduced to writing and signed by the parties or their representatives.

9.3 No addition to, variation or agreed cancellation of this agreement or the annexure thereto shall be of any force and effect unless in writing and signed by or on behalf of the parties.

9.4 No indulgence which either party may grant to the other shall constitute a waiver of any of the rights of the former."

[7] The agreement also provided that the loan would be repayable 24 months after applicant had demanded repayment of the then outstanding balance.

[8] Applicant says that the agreement was a straightforward loan, that it had demanded repayment of the balance of the loan on 25 July 2017, and that the debt had become due and payable on or before 26 July 2019.

[9] Respondent, represented by Rabbi Menachem Lipskar, has a completely different version of events. He is, together with Solomon Krok who deposed to a confirmatory affidavit on behalf of respondent, the only persons who have personal knowledge of the events that unfolded in August 1994. Rabbi Lipskar says that Solomon and Abraham Krok wished

to assist respondent in settling the debt in its entirety. They therefore devised a scheme whereby they would advance the funds to respondent through applicant (of which they were directors together with Arthur Aaron), so that respondent could settle the Nedbank debt.

[10] The scheme, according to Rabbi Lipskar, included a deal whereby Golden Hands would utilize the profits from the cluster development to settle respondent's debt to applicant. At that stage one Joseph Rabin was the sole director and shareholder in Golden Hands. Golden Hands in fact paid R 2 429 440.00 to applicant in part-payment of respondent's debt. Rabbi Lipskar says that he was assured by Solomon and Abraham Krok, on numerous occasions, that applicant would never be required to settle the debt, as the proceeds from the cluster development would be used for that purpose. Solomon Krok confirms this version in a confirmatory affidavit to the respondent's answer.

[11] Applicant cannot contradict respondent's version as none of its witnesses have personal knowledge regarding the events of August

1994. Applicant says, firstly, that the respondent's version is inconsistent with the objective evidence, and secondly, that it is legally untenable.
- [12] There is no reason to reject the evidence of Rabbi Lipskar and that of Solomon Krok. Support for their version is to be found in the fact that Golden Hands was party to the loan agreement and that it stood surety for the respondent's debt. This fact, and the part-payment by Golden Hands to the applicant, supports the version that it was envisaged that Golden Hands would repay the loan, and that respondent would never be required to do so.
- [13] Applicant argues that over many years the applicant has reported the transaction as a loan in its financial statements. That fact, applicant says, is indicative of the fact that it was simply a loan, and was repayable in accordance with the terms of the agreement. In my view, the fact that the transaction was treated as a loan in applicant's financial statements does not mean that the Krok brothers did not waive repayment. There may well have been a business reason why the transaction was so reflected in applicant's books.
- [14] On 23 October 1998 the respondent's accountants made the following enquiry to Solomon Krok:
- "I refer to the agreement between the Lubavich Foundation and Phoenix Salt Industries (Pty) Ltd. Please can you advise on the accounting*
- treatment adopted by the above company in respect of this transaction as well as the amount shown as receivable from the foundation in respect of the 1995, 1996 and 1997 financial years."
- [15] This letter, applicant argues, is an acknowledgement that respondent was indebted to applicant. In my view, the letter is simply an enquiry as to how the transaction was treated in applicant's books, and how much is reflected in the books as being owed. It is not a concession that respondent was liable for payment. On 12 January 1999 applicant's auditor sent loan certificates to respondent reflecting the 1995, 1996, 1997 and 1998 balances. Respondent did not take issue with the certificates. Applicant says that if respondent had believed that it was not liable for payment it would have disputed the certificates.
- [16] There is no dispute that during the tenure of Solomon and Abraham Krok as directors of the applicant, no attempt was made to enforce the agreement. They resigned as directors of applicant in November 2003, and were replaced by Martin and Maxim Krok. Perhaps coincidentally, or perhaps not, on 19 November 2003 the applicant's auditor requested respondent to acknowledge the outstanding balance as being R 7.8 million. No response was received from respondent.
- [17] Applicant argues that respondent's lack of protest that the loan was not repayable, and its failure to dispute the certificates, is indicative of its understanding that the monies remained due to applicant. It may be so that one would have expected respondent to protest on receipt of the certificates, and to say that it did not owe the monies. However, can I deduct from the lack of response that the evidence of Solomon Krok should be rejected? I do not believe so. Furthermore, the Plascon-Evans test^[1] requires me to accept the

respondent's version in motion proceedings where it is in conflict with that of the applicant, unless the version is so far-fetched and untenable that it can be rejected on the papers. I therefore accept the respondent's version of events.

- [18] The further question is whether the defence put up is legally tenable. Applicant says that the defence of waiver is ousted by the non-variation and non-waiver clauses in the loan agreement. In the absence of an agreement in writing to vary the terms of the agreement, applicant says, the alleged oral variation is of no force and effect.
- [19] Respondent argues that Solomon and Abraham Krok, acting on behalf of applicant, had concluded a pactum de non petendo, which was not struck by the non-variation and non-waiver clauses in the agreement.
- [20] There was, until the issue was settled in SA Sentrale Ko-op Graanmaatskappy BPK v Shifren[2], some debate as to whether a non-variation clause was valid.
- [21] Shifren (supra) put the debate to rest. Steyn CJ wrote:[3]

“Waar partye so ‘n bepaling in hul kontrak ingelyf het, d.w.s. ‘n bepaling wat nie slegs ander bedinge nie, maar ook himself teen mondelinge wysiging heet te beveilig, kan ek geen rede vind waarom die een party nie die ander daaraan gebonde kan hou nie.

- [22] Although the debate regarding the validity of non-variation clauses was put to rest, and the principle has been reaffirmed subsequently,[4] it has been recognized that a rigid application of the Shifren principle may, in certain circumstances, result in injustice. For instance, if parties to a contract were to orally agree to a changed contractual regime, and conduct themselves in accordance with their mutual understanding without recording the variation in writing, if one party were later to enforce the strict terms of the agreement on the basis that the agreement was only variable in writing, the other party, who has abided by the oral agreement, may suffer serious prejudice.
- [23] Hutchinson has referred to this difficulty as “the Shifren straitjacket” in a useful article[5] in which he analyzed the various ways in which courts have attempted to soften the impact of the Shifren rule, in order to prevent

inequitable outcomes. Although the Shifren-rule has been consistently applied, non-variation clauses have been restrictively interpreted,

thus ameliorating the effect of the Shifren-rule.[6] In Hillsage Investments (Pty) Ltd v National Exposition (Pty) Ltd[7] the court dealt with the waiver of a right by a party to whose sole benefit the right accrued. The court held that “... a stipulation that which is clearly inserted for the benefit of one of the parties, can, if he so wishes, be waived by him.”

- [24] In Impala Distributors v Taunus Chemical Manufacturing[8] the court said:

“Maar afstandoening, en ook mondelinge afstanddoening, speel beslis ‘n rol in die samehang van hierdie regsfiguur. Dit kan egter alleen betrekking hê op ‘n bepaling wat uitsluitend tot voordeel van een party is. ‘n Bepaling, bv. dat huurgeld betaal moet word, is uitsluitend tot voordeel van die verhuurder en hy kan vanselfsprekend eensydig afstand doen van sy reg om dit in te vorder. Hy kan dit mondeling doen en selfs stilswyend. Dit is geen wysiging van die kontrak nie. Dit is ‘n pactum de non petendo wat naas die kontrak kan bestaan.

[25] In *Minnit v Stewart Wrightson (Pty) Ltd*[9], following the lead in *Impala* (supra) the court recognized the principle that a stipulation for the benefit of one party may fall outside of the ambit of a non-variation clause, and may then be waived unilaterally.

[26] In *Miller N.O. and Another v Danneker*[10] a franchisor agreed not to institute action for payment of franchise fees a period, in order to give the franchisee time to dispose of his interest in a guest house. Nevertheless, action was instituted against the franchisee. In denying summary judgment Ntsebeza AJ said[11]:

“The defence of pactum de non petendo is still part of our law. In Impala Distributors v Taunus Chemical Manufacturing.... Hiemstra J held that when a contract provides that dissolution thereof can only take place in writing, such a restriction can be revoked by oral agreement....

The pactum, the judge held, merely suspends the capacity or right of a creditor to sue for a specified period or until the occurrence of some contingency.”

[27] In this case applicant argued that a pactum de non petendo is always limited to a specific period, or is only operative until the occurrence of a specific event. It thus entails a temporary suspension of an obligation, and is not, as in this case, of permanent effect. That contention seems to me to be correct. Van der Merwe, *Contract General Principles*[12], says that a pactum de non petendo “suspends the capacity to enforce [a contract], usually for a specified period or until the occurrence of some contingency” (emphasis added). For that reason respondent’s reliance on a pactum de non petendo must be incorrect.

[28] It seems to me, however, that a pactum de non petendo must be distinguished from other forms of waiver. The former suspends a contracting party’s right to enforce a contractual right for a period, whereas a waiver may be:

“...the renunciation of a right. When the intention to renounce is expressly communicated to the person affected he is entitled to act upon it.”[13]

The term has been used loosely in various judgments (as Hutchinson (supra) points out) in the context of the release of a debtor from an obligation to perform, an agreement not to sue or to enforce a right, and an election by a creditor between alternative remedies.

[29] Christie[14] is of the view that a waiver “invariably results in the variation of that contract....”. I do not agree. One should distinguish between a variation, which amends the terms of the agreement, and a waiver, where the terms of the agreement remain the same, but one party’s entitlement to enforce a right arising from the agreement is extinguished. It

is one thing to say “I agree that the monthly rental will be reduced by 50%”, as opposed to saying “I undertake not to sue you for the arrear rental”. The former amends the agreement, the latter is the abandonment of a contractual right. In *Van As v Du Preez*[15] the court said:

“It is unnecessary to canvass what the juristic nature of a waiver is and more particularly whether it is contractual in form or merely a unilateral act. Suffice it to say that, however brought about, it is the abandonment or surrender (with the necessary knowledge) of a right It does not per se result in the contract being altered. Herein lies the difference between it and a variation. This is the distinction drawn by HIEMSTRA J in the Impala Distributors case. The English approach, as Tager (at

435) points out, is similar, namely a waiver is a ‘mere forbearance afforded by one party or the other for the latter’s convenience and at his request’ whereas a variation involves ‘a definite alteration, as a matter of contract, of contractual obligations by the mutual agreement of both parties’”.

[30] In my view the applicant clearly waived its right to call up the loan and to enforce the strict terms of the agreement. The only remaining question is whether the waiver is ousted by the terms of clause 9.4 of the agreement which provides that the granting of an indulgence shall not be regarded as a waiver of applicant’s rights. An indulgence is simply that, a temporary freeing of a party to an agreement from strict compliance with the terms thereof. That is not the position in this case. In this matter the Krok brothers permanently abandoned applicant’s right to call up the loan, and to enforce payment in terms of the agreement.

[31] As I have said above, terms which restrict a party’s freedom to contract must be restrictively interpreted. Clause 9.4 relates only to the granting of indulgences, and does not restrict applicant from permanently abandoning its rights. The application must therefore fail.

[32] I make the following order:

[32.1] The application is dismissed with costs.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 January 2023.

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DATE HEARD:

15 November 2022

DATE OF JUDGMENT: 19

January 2023

[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (AD) at 634 (H)

[2] 1964

(4) SA 760 (A)

[3] At 766

[4] Brisley v Drotsky 2002 (4) SA 1 (SCA)

[5] Hutchinson D, 2001 SALJ 720

[6] Randcoal Services Ltd and Others v Randgold and Exploration Co Ltd 1998 (4) SA 825 (SCA)

[7] 1974

(3) SA 346 (W) at 354

[8] 1975

(3) SA 273 (T)

[9] 1979

(4) SA 151 (C)

[10] [1999] JOL 4956 (C)

[11] At para 10

[12] 2nd Ed at 373 – 374

[13] Mutual Life Insurance Co of New York v Ingle 1910 TPD 540 at 550, affirmed in Botha (now Griessel) and another v Finanscredit (Pty) Ltd 1989

(3) SA 773 (A)

[14] Christies Law of Contract in South Africa, 6th Ed, page 453

[15] 1981

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- (3) SA 760 (T) at 764 F - H; See also *Sunset Village SPV (Pty) Ltd v Smith Tabatha Buchanan Boyes Inc and others* [2010] JOL 24786 (WCC)
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